United States Court of Appeals

for the Second Circuit



APPELLANT'S BRIEF

ORIGINAL

74-1693

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To be argued by
ROY M. COHN

P/S

In The
United States Court of Appeals
For The Second Circuit

No. 74-1693
No. 74-1704

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

vs.

TILNEY & COMPANY,
FREDERICK TILNEY,

Defendants-Appellants,

— and —

I. ALAN HARRIS (Cross-Appellant);
JOSEPH C. HOGAN;

Appellee.

On Appeal from Judgment of the United States District Court for the Southern District of New York

BRIEF FOR DEFENDANTS-APPELLANTS TILNEY & COMPANY; FREDERICK TILNEY

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BRIEF FOR DEFENDANTS-APPELLANTS TILNEY & COMPANY; FREDERICK TILNEY

STATEMENT OF ISSUES

1. Whether or not the awarding of $184,572 in fees to the Receivers and their agents was not highly excessive in view of the incompetent, negligent and improper manner in which the estate was administered, in view of the fact that the awarded fees amounted to seventy per cent (70% of the total paid claims, which were only $265,000), and in view of the inordinate length of time (over six years) it took the receivers to wind up the estate.

2. Whether any award at all should have been made to Receiver I. Alan Harris, in view of his misfeasance as a receiver in selling bank stock of the estate to a close personal friend, receiving back a part of the stock without payment therefor and joining the board of the bank, resulting in his resignation at the suggestion of the Court.

3. Whether the Court should have permitted Mr. Tilney a substitution of attorneys, when such substitution would have caused no delay or inconvenience to the Court or any of the parties and when denial thereof resulted in depriving Mr. Tilney of legal representation on the vital issue of a surcharge against the receivers; and failing that, whether the Court further erred in then refusing even to permit Mr. Tilney to proceed *pro se* on his surcharge application, when the effect of the denial was to deprive Mr. Tilney of a hearing on this issue, which hearing would have established the considerable damage to Mr. Tilney caused by the incompetence, negligence and improper acts of the receivers.

STATEMENT OF THE CASE

Preliminary Statement

This is an appeal from an order of the Hon. David N. Edelstein, Chief Judge of the United States District Court

for the Southern District of New York, filed on March 20, 1974, as modified by an order entered April 19, 1974, and from all other orders and rulings theretofore made. Judge Edelstein has presided over all proceedings herein.

The receivership was initiated on a technical basis in late 1967 and even though it was almost immediately apparent that ample assets were available to pay all creditors 100 cents on the dollar, the receivership was wilfully prolonged for over six years, during which time fees of $184,572 were awarded against total claims paid out of $265,000. At the end of the receivership an attempt was made to blunt the right to appeal by requiring as a condition for the release of Tilney's assets a bond in the amount of $150,000, which the Court considered to be the value of the remaining assets. Only the intervention of this Court in reducing the amount of the bond to $25,000 and ordering a return of the surplus assets enabled this appeal to go forward.

The two complaints upon which the receivership is predicated were filed by the Securities and Exchange Commission (hereinafter called "SEC") — one on August 18, 1967, and another on November 28, 1967 — charging Tilney & Company, a partnership doing business as a securities broker-dealer (of which Mr. Frederick Tilney is the sole general partner) and Frederick Tilney individually with various violations of bookkeeping, record-keeping and net capital regulations under the Securities and Exchange Act of 1934.

On motion of the SEC, consented to by the defendants, Joseph C. Hogan and I. Alan Harris were appointed receivers by the Court below on December 18, 1967. Thereafter, said receivers selected Wagner, Quillinan & Tennant as their attorneys and B. Bernard Greidinger & Company (which firm was ultimately succeeded by its successor firm, Hertz, Herson & Company) as their accountants.

On July 16, 1969, after the SEC had characterized certain of his activities as "tainted" and after Tilney had

requested his resignation, Harris, upon prodding by the Court, withdrew as a receiver. He was not thereafter replaced and Hogan continued as the sole receiver.

On December 24, 1970, Mr. Tilney formally moved to terminate the receivership on the grounds that there were sufficient liquid assets available to pay all creditors and reasonable administration expenses. The motion was denied by order dated May 6, 1971.

After a regional office of the SEC had counseled creditors in writing to contact their congressmen about the inordinate delay in the Court proceedings, the Court on May 24, 1971, formally ordered the receivers to make a 65% payment to creditors and on October 15, 1971, directed a full payment. On October 19, 1972, the Court directed 6% interest to be paid to public investor creditors.

In March, 1972, applications for administration fees totaling $309,415 were filed. By decision dated October 19, 1972, awards totaling $184,572 were made as follows: Receiver Hogan, $43,650; Receiver Harris, $23,800; the Wagner law firm, $55,660; and the Hertz, Herson accounting firm, $61,552. This decision was formalized by an order entered December 21, 1972. The beneficiaries of these awards promptly paid themselves.

On March 16, 1972, Cadwalader, Wickersham & Taft, as attorneys for Tilney and Tilney & Company, filed an application to have Saxe, Bacon & Bolan substituted for them. This application was denied by the Court on April 18, 1972. On June 29, 1972, Tilney made application to the Court to represent himself *pro se* on a surcharge application against the receivers. In an opinion dated February 21, 1974 (about 20 months after the application), the Court denied the application.

Finally, the Court below terminated the receivership by an order dated March 19, 1974. In its order, the Court directed a return of Tilney's assets within 30 days, apparently believing by then the period for filing a notice to this Court would have expired, thus freezing Tilney's

remaining assets and removing any temptation to appeal. But when the realization dawned that the 60-day period applied, (a Government agency being a party), Receiver Hogan succeeded in persuading the Court to amend its order so that Tilney's assets could not be released except upon the posting of a $150,000 bond.

Prompt assistance was solicited from this Court by motion and on May 8, 1974 this Court directed the Receiver to release Mr. Tilney's assets upon the posting of a $25,000 bond and the satisfaction of a $7,000 obligation to Hertz Corporation.

FACTS

Extraordinary Delay in Winding up Estate

Although the value of the assets turned over to the receivers constituted a major source of disagreement between the receivers and Mr. Tilney throughout the receivership, said value was always well in excess of the amount needed to pay everyone. Using figures accepted by the SEC and by the Court below, without conceding their accuracy, the assets on hand at the time the receivership commenced amounted to $995,084 and an additional $370,000 was collected thereafter, for a total of $1,365,084, of which total $668,000 was transferred to banks in liquidation of collateralized claims. (A. pp. 1125-1126) Thus, even on these figures, the receivers had assets of approximately $700,000 for payment of other creditors and administrative expenses. As a matter of fact, after payment of all creditor claims ($265,000), plus interest ($39,000) and administrative fees ($190,000), Receiver Hogan by his own estimate at the termination of the receivership had on hand for delivery to Tilney assets valued at $300,000. (A. p. 1415)

Tilney, even prior to the appointment of the receivers, stated he was eager to liquidate what was necessary to pay off his debts. (A. p. 24) In February, 1968, Tilney complained that delays were wasting the estate and proposed an immediate liquidation. (A. pp. 64-66) Ironically,

the Court directed the receivers to consider any reasonable plan for the "earliest liquidation" or "liquidation with dispatch". (A. p. 67) In August, 1968, the Court referred to a greater immediacy in "winding up this estate". (A. p. 99) In November, 1968, the Court stated that it was necessary to move along "with all due expedition" and that it didn't want the receivership to be "an albatross" on Tilney's back indefinitely. (A. p. 135) Six years later it still is.

Tilney repeatedly urged the receivers to pay off the creditors and make an estimate of their fees for the purpose of determining what, if any, additional assets had to be liquidated. (A. pp. 166, 307, 560A-561A, 602) His requests were always ignored.

On July 24, 1969, Tilney pointed out to the Court that the only liability "remaining in limbo" was administrative fees and asked that the Court wind up the estate, as "this is our life". (A. pp. 299-301) Tilney again requested a statement of the receivers' fees. (A. p. 302) Receiver Hogan, his attorneys and accountants promised to submit a request for interim allowances of fees within one month (A. pp. 303-304), but did not follow through on this commitment.

On September 24, 1969, after the Court had stated that it was "extremely important" to get some estimate of the fees (A. p. 323), the attorneys and accountants promised to submit their interim applications by November 24, 1969 (A. pp. 325-326) and the receiver no later than January 1, 1970. (A. p. 323) The Court requested the receiver to make an effort to file his application by the earlier date, i.e., November 24, 1969. A stipulation was entered into between the receiver and the SEC dated November 24, 1969, to which Tilney was not a signatory and of which he had no knowledge, extending the time to file all applications for fees to January 15, 1970. The stipulation was "So Ordered" by the Court. This stipulation and the previous direction of the Court were totally ignored.

The attorneys did not sign their application until February 12, 1970 and it was entered on the docket on

March 10, 1970. The accountants signed their application on April 9 and the receiver signed his on April 14, 1970, both being docketed on April 29, 1970. Harris signed his application on May 1 and it was docketed on May 4, 1970.

The total claimed fees in these applications came to $211,000 and covered the period ending February 28, 1970. A hearing on the applications was scheduled by the Court for November 16, 1970. On October 15, 1970, the SEC withdrew its previous demand for interim fee allowances and stated that no allowances should be paid except final allowances, explaining that when it had originally made its request for interim allowances it had hoped to bring matters effectively to head, but did not expect the hiatus between its request (first made on July 16, 1969, A. pp. 292-293) and the hearing on the interim allowances (then set for November 16, 1970). (A. pp. 597-600) Tilney joined the SEC on this position (A. p. 602) and the receivers subsequently withdrew their applications. The SEC asked the Court to find a way to bring on "as quickly as possible" final applications. (A. p. 598)

On December 24, 1970, Tilney moved to terminate the receivership on the grounds that there were sufficient liquid assets in the hands of the receiver with which (1) to satisfy the claims of all creditors and (2) pay reasonable administrative expenses. At that time, as the SEC pointed out, the receiver had cash assets of $400,000 as against maximum liabilities of $280,000 (A. pp. 680-681), thus leaving for administrative fees $120,000 in cash, plus unliquidated assets of a value far in excess of what might be needed for any fees fixed in excess of $120,000. The only unknown liability, as had been the case for two years, was the fees of the receivers. In opposing the motion, Receiver Hogan conceded that it would not be necessary to liquidate all remaining assets of the estate. (A. p. 663) Furthermore, Harris, who had been forced to resign in July, 1969, and thus no longer had any financial interest in prolonging the receivership, had already informed the Court as follows:

> "I have stated, your Honor, in my petition report, which was of considerable length, repeatedly, and I am willing to stand on it, over and over again, that there is enough in this estate, still enough, even with the difficulties Mr. Hogan has mentioned, that not only would all administration expenses possibly be paid out but all creditors would be paid . . .
>
> ". . . there is more than enough to pay off the public, . . . and the administration expenses, not only interim but ultimate, final, your Honor." (A. p. 604)

Harris in his report and petition for allowance dated May 1, 1970 had previously stated:

> "After studying and analyzing the massive and complicated financial statements and other material available, including written and oral statements, letters, status reports and analyses prepared by Tilney himself, *your petitioner came early to the conclusion that these receivership estates were solvent, and that all just creditors and claimants would be paid in full even after the payment of all administrative expenses.*" (Emphasis supplied) (A. p. 422)

Whereas Harris, with no stake in a prolongation of the estate, wanted to be paid, Hogan opposed its termination. The Court ruled that Tilney's motion to terminate was unfounded because it was "based on an assumption that the expenses of administration, whatever those expenses may prove to be, will be met by liquidated assets or assets that are still available to the receiver" (A. p. 676), and formally denied the motion on May 6, 1971. The Court thus disregarded statements both by Hogan's attorneys (A. p. 663) and Harris that it would not be necessary to liquidate all assets to meet expenses. (A. pp. 676-677)

Having advised the Court in September, 1969, that "justice long delayed is justice denied" and that payment to the creditors would be meaningless if not made promptly (A. pp. 317-321), the SEC in January, 1971, pointed out to the Court that the receivership was entering into the fourth year and that the necessity for a swift and complete payout, with interest if possible, to all creditors is "apparent and urgent." (A. p. 680) It asked the Court to speed resolution of this matter by setting final administrative costs, pointing out that once fees have been fixed the Court can determine whether further liquidation is warranted. (A. p. 681) It urged upon the Court "the absolute necessity of a swift and fair termination of this matter compatible with the payout of fair administrative expenses and a full payout to all creditors." At a hearing on January 29, 1971, on Tilney's motion to terminate, the SEC again requested the Court to fix final fees to determine whether further liquidation would be necessary, stating that Tilney had indicated throughout the proceeding that he was fearful that the liquidation would exceed that which is legitimate and necessary. (A. p. 674) The SEC noted that "the bone of contention here are the fees" and requested that they be set, adding that this could be done "very expeditiously." (A. p. 675)

At the January 29, 1971 hearing the SEC, in opposing the position of Receiver Hogan, informed the Court that "there is a continuing and consistent and growing protest on the part of the people who have yet to be paid, as manifest through the U.S. Attorney's office in Alaska and through various congressional representatives, so we feel a great press here, and I believe that the equities of the situation require speed as far as paying to the individuals." (A. p. 673)

On April 29, 1971, the Regional Administrator for the SEC, headquartered in Seattle, Washington, wrote one of Tilney's creditors as follows, in part:

> "... please be advised that the Commission has been doing its utmost to have the court in charge of

> the receivership issue an order directing payment of customers' claims. Our New York office still reports that the court does not appear to be making much headway toward resolution of the matter.
>
> "That office has suggested that customers of Tilney & Co. might be able to expedite payment of their claims by writing directly to the court and to their senators and congressmen to let them know how the customers feel about the lack of progress in the receivership proceedings . . ." (A. p. 741)

On May 6, 1971, the SEC again reminded the Court that the receivership was in its fourth year and that the necessity for swift and immediate payment to all creditors is apparent and urgent. (A. p. 695)

On May 25, 1971, the Court ordered a 65% payment to creditors and on October 15, 1971, payment of the balance.

On April 13, 1972, the SEC advised the Court that there was a sufficient corpus to pay both interest and fair and equitable administration fees. (A. p. 926)

In March, 1972, applications for final fees totalling $309,415 were made as follows: Receiver Hogan, $65,790.80; Receiver Harris, $57,500; Wagner law firm, $96,935.00; and Hertz Herson accounting firm, $89,189.00. This represented an increase of approximately $100,000 above the request for interim fees previously submitted.

By affidavit sworn to April 17, 1972, Tilney stated, in terms that seem generous under the circumstances, that the value of the services was a maximum of $80,000, divided as follows: Hogan, $20,000; Wagner law firm, $40,000; Hertz Herson accounting firm, $20,000. He urged that no payment be made to Harris because of misfeasance in office (see below). Mr. Tilney also submitted a Supplemental Affidavit of the same date in support of a surcharge against the receivers in the amount of $908,840, which, for reasons specified hereinafter, was not accepted by the Court. (A. pp. 937-942)

In a report dated May 10, 1972, the SEC recommended total allowances of $153,870 as follows: Hogan, $36,000; Harris, $21,000; Wagner law firm, $46,000; and Hertz Herson accounting firm, $50,870.

In its report, the SEC makes the following comments:

> "On the other hand, although there were undoubtedly difficulties involved in liquidating some of the properties involved, it appears to us that the liquidation could have been conducted more promptly and that the delays that have occurred may have added to the expense of the receivership. In addition, the primary responsibility of the receivers — payment of claims of the public investors who had dealt with Tilney — was in fact accomplished with relatively little effort beyond ascertaining the justness of their claims; the Commission had developed some of the necessary information before bringing the action, and F. Tilney himself also provided some help in locating additional investors. Moreover, with specific reference to their request for fees, much of the work performed by the several petitioners involved routine chores, as an examination of their time sheets reveal. For these reasons we believe the petitioners should be paid a more modest rate than might otherwise have been considered appropriate." (A. p. 1125)

The SEC had informed the Court that if interest were to be paid the creditors, the SEC's concern about excessive fees would be "minimized." (A. pp. 928-929) The Court thereupon requested the SEC to reconsider its recommendations on the assumption that 6% interest would be paid to creditors. Acting on this request and on the assumption that interest would be paid (as Tilney had always urged) (A. pp. 720, 911-912), the SEC in a letter to Judge Edelstein dated May 19, 1972, increased its recommendations by 10%, or $15,787, for a total of $169,657, as follows: Hogan, $39,600; Harris, $23,500;

Wagner law firm, $50,600; and Hertz Herson accounting firm, $55,957. (A. p. 1139)

In concluding its letter to Judge Edelstein, the SEC stated:

> "The Commission was influenced in its judgment that modest fees are appropriate in this case, notwithstanding full payment shall have been made to all public investors, because, as the Commission has already advised the Court, there appears to have been duplication of effort between the co-receivers and among counsel, an unduly long delay has occurred in bringing this matter to completion, and much of the time claimed by the applicants appears to have been devoted to routine matters; with respect to the accountants, an unusual amount of time is claimed on behalf of senior as compared to junior personnel." (A. pp. 1139-1140)

In an opinion dated October 19, 1972, formalized by an order dated December 21, 1972, the Court made the following awards totalling $184,572: Hogan, $43,560; Harris, $23,800; Wagner law firm, $55,660; Hertz Herson accounting firm, $61,552. The Court's award thus still exceeds by approximately $15,000 the amount which it pressured the SEC into recommending.

The Court also granted the application of L.D. Blum, accountants, for payment in the amount of $6,825, which application was not and is not in issue in these proceedings. For the convenience of the Court, the following tabulation is made:

	Fees Requested	Tilney Recommendation	Recommendation of SEC Original	Recommendation of SEC Amended	Fees Awarded By Court
Hogan	$ 65,791	20,000	$ 36,000	$ 39,600	$ 43,560
Harris	57,500	—0—	21,000	23,500	23,800
Wagner Law Firm	96,935	40,000	46,000	50,600	55,660
Hertz Herson Accounting Firm	89,189	20,000	50,870	55,957	61,552
Total	$309,415	$80,000	$153,870	$169,657	$184,572

The Court in October 1972 directed payment of 6% interest to creditors (A. p. 1204), resulting in a total payment of $38,761. (A. p. 1268)

By opinion dated February 21, 1974, and formalized by order dated March 19, 1974, the Court terminated the receivership and directed a return to Mr. Tilney of his assets within 30 days. This order was amended on April 19, 1974, permitting the receiver to retain all assets pending the posting of a $150,000 bond. As stated above, this Court ordered the release of the assets pending the posting of a $25,000 bond.

Misfeasance of Harris

One of the assets of this estate was 786.67 shares of stock of The Waddington Bank of New York, representing control stock of that bank. In a memorandum handed the receivers on May 29, 1968, Tilney advised that the book value of the stock was $51.50 per share as of December 31, 1967, but that a realistic price for the stock at that time was $70 to $80 per share. (A. pp. 183, 192) Shortly thereafter Hogan agreed to sell said stock to Blyth & Company at $47.00 per share. (A. p. 177) Harris states that Hogan was mistaken in thinking that he had Harris' permission to sell the stock. (A. pp. 177, 195) The Blyth sale was cancelled at

Harris' insistence and Blyth which had resold the stock to a customer was forced to buy back the contract at a loss of $4,000. Prior to the cancellation, 675 shares of the stock were being offered for sale at $65.00 per share. (A. p. 184) Harris then arranged to sell the stock to a very old friend of his, one Jack H. Studley, at $50.00 per share on July 12, 1968. (A. pp. 171-174, 178) Studley thereafter transferred 100 shares of the stock to Harris without any payment therefor and Receiver Harris himself actually became a director of the bank on January 15, 1969. (A. pp. 172-174)

Harris states that he was merely a "nominal holder" of the stock and not the beneficial holder and the shares were "merely recorded purely for the purpose of qualifying under the State Banking Law." (A. pp. 193-194)

The Court had not been aware that Harris was negotiating with a friend. (A. p. 174) Co-Receiver Hogan did not know of Harris' directorship, nor of his stock ownership until told of it by Tilney towards the end of May, 1969 (A. pp. 174-175) but apparently was aware that he had been negotiating with a friend. (A. p. 175) The matter was brought to the Court's attention on June 5, 1969. The Court stated to Harris that it was "sorry that I wasn't made aware that these shares were being negotiated with a friend of yours. I am sorry that I didn't know that you had finally taken a position on the board. I regret that it happened." (A. p. 196) The Court instructed Harris to resign from the board of Waddington and return the qualifying shares. (A. p. 194) The Court requested the SEC to obtain a valuation. Tilney also undertook to obtain a valuation, but on June 26, 1969, reported to the Court that he was unable to obtain one because of lack of funds. (A. p. 216) On that date, the SEC informed the Court that it considered the transaction as "tainted" and requested that the sale be rescinded, stating that the question of value is not relevant on the issue of taint. (A. p. 217) The Court stated that it was "perfectly prepared to accept the suggestion of the SEC, because it pretty much is in accord with my own thinking. I know that I think I would be freer in mind if we

rescind this sale." (A. p. 221) The Court also stated:

> "Had I been aware of any affinity or relationship or contact or even friendship, close or otherwise, at the point when this transaction was being negotiated and subsequently effected, I certainly would have been very much opposed to dealings under those circumstances because as a matter of reality sometimes the name is just as glaring as the game.
>
> I certainly feel that I would have been most reluctant to have given my approval to any such transaction unless every possible condition and circumstance at that time placed upon the table in conference would have revealed indubitably, with the SEC being in accord, that this transaction was in the best interests of the public, and this is our prime concern. I have no concern with any individual here except insofar as they can assist us in liquidating this estate equitably and soundly and wisely and prudently for the benefit of the public and the creditors. But this transaction was never disclosed and none of us really had an opportunity to appraise it." (A. pp. 219-220)

The Court added that the matter "has distressed me no end, caused me some sleepless moments because I have been very unhappy about it and I don't think I have overreacted." (A. p. 223)

On June 26, 1969, Tilney asked that Harris resign his position as receiver. (A. p. 224) The Court stated that "perhaps under all the circumstances here it would be best" that he resign. (A. p. 226) The Court considered a statement by Harris that he was prepared to do anything that would assist the liquidation of the estate as an offer of resignation which the Court accepted. (A. pp. 226-227) His resignation was formally noted on July 16, 1969. The Waddington stock was thereafter sold at auction at $50.00

per share on September 24, 1969 (A. pp. 308-315), some 14 months after the original sale to Studley and at the same price.

In its Response of May 10, 1972, the SEC noted that Harris had resigned "as a result of criticism" of his sale of the Waddington stock. The Court fixed his fee at $30,800 and deducted $7,000 for the cost of the Waddington resale, for a net fee of $23,800.

Irreparable Damage Inflicted on Tilney by Receivers' Actions

Tilney is married to Dorothy M. Tilney and they have three children who were 14, 10 and 7 years old when the receivership commenced. (A. p. 1354) They have suffered greatly during these proceedings and in particular in 1972 when they were without funds to pay necessary living expenses. During the summer and through mid-December of that year, the family resided in a home without heat, electricity or cooking facilities, other than gasoline stoves and open fires, and for most of the period with telephone disconnected. (A. p. 1355)

During the course of the receivership, the three children were forced to leave private school because funds were unavailable for tuition. Tilney and his wife were forced to surrender valuable life insurance and the family has not been covered by health insurance for several years. Medical and dental treatment have had to be deferred for lack of funds. The suggestion that the family seek welfare assistance for medical purposes was not helpful in view of the substantial assets still in the hands of the receivers. (A. p. 1356)

Facing trial in Alaska on a 31-count indictment charging him with SEC violations and being without funds, Tilney on June 8, 1972 applied to the court in Anchorage for funds to defend himself. (A. p. 1170) The Anchorage Court suggested that the application be made to the court below.

(A. p. 1170) On June 21, 1972, the court below refused to release any of Tilney's funds, stating that "Tilney had failed to make a showing why this extraordinary relief should be granted." (A. p. 1173)

The Court had refused to release the funds despite the fact that the attorney for the receiver on May 16, 1972 had stated that even after payment of requested final administrative fees and interest, there would still be approximately $63,000 in assets remaining to be turned over to Tilney. (A. pp. 1135-1136) Unable to pay for expenses, including those for an attorney and witnesses, Tilney was helpless and on July 5, 1972, pleaded guilty to one count of the indictment. (A. pp. 1313-1314) He had to borrow money from friends and associates to make the trip to Alaska to enter his plea and also to return for sentencing. (A. p. 1355) On November 6, 1972, he was given 3 years probation without imprisonment and fined $3,000. (A. p. 1298) Had his assets been turned over to him, Tilney would have vigorously defended the Alaska action.

Harassment of Tilney during Receivership

In August, 1968, out of Tilney's presence, Receiver Harris exhibited an "animosity" towards him and stated that when the receivers got through with him he would be broke, adding that the next thing they would do would be to sell Tilney's home. (A. pp. 987-991) Tilney's home, called "Sundown", is located on Centre Island, Oyster Bay, New York, and he has resided there since 1927. (A. p. 1296) Although clearly there never was any need to sell his home, throughout these proceedings the receivers have threatened to do so, using this threat as a means of intimidating and pressuring him. (A. pp. 101, 156-159D, 668-672, 914-916, 1239, 1241-1242) The home was never sold but has not been released.

Prior to Tilney's discovery of Harris' improper involvement in The Waddington Bank sale, he was on a first-name basis with both receivers (A. pp. 60, 159) and exchanged compliments with them on the record, Harris stating at one

point that Tilney had "cooperated to the fullest." (A. pp. 41-42, 56-59, 65-66) After becoming aware of the Waddington transaction, he refused to talk to Harris. (A. p. 176) From then on, the harassment of Tilney intensified. The Court's attitude also changed. In November, 1968, the Court had told Tilney that he was "always free" to address the Court. (A. p. 134) After the Waddington re-sale in September 1969, the Court directed Tilney not to "interfere with the receivership in any manner." (A. p. 324) With rare exceptions, this attitude persisted for the remainder of the receivership; — i.e., on May 6, 1971, the Court told Tilney, "I am not going to hear from you about anything" (A. p. 694); on November 27, 1972: "You have no standing to say anything." (A. p. 1240)

In April, 1969, Mrs. Tilney in an attempt to raise cash, sought to auction off household furniture owned by her. The receivers blocked the auction (A. p. 1400) and did not release Mrs. Tilney's property until the fall of 1973. (A. p. 1354)

Typical of the harassment to which Tilney was subjected was the badgering efforts of Receiver Hogan to close out a $300 checking account of Tilney as late as 1972. (A. p. 919)

Throughout most of the receivership, the receivers and counsel threatened Tilney and his wife with contempt proceedings unless they did their bidding. (A. p. 1352) On May 6, 1971, Tilney indicated to the Court that he was going to request the removal of Receiver Hogan for incompetency and failure to perform. (A. p. 692) Several weeks thereafter, on June 18, 1971, the receiver moved to hold Mr. and Mrs. Tilney in criminal contempt for allegedly having contacted creditors in violation of the Court's direction. On June 28, 1971, the Court said it would request the United States Attorney to prepare an order to show cause specifying these charges and that the Tilneys would be given sufficient time to prepare for trial at a time and place to be set. (A. p. 722) The United States Attorney's office, after interviewing the Tilneys (A. p. 1356), took no action on the referral.

The Creditors

The total number of creditors paid came to 137, of whom 98 were customer creditors (A. pp. 1282-1291) Two of these creditors were members of Tilney's family. The creditors receiving interest numbered 94. (A. pp. 1281-1291) The total amount paid the creditors was $265,626 and total interest $38,761. (A. p. 1268) Of the $265,626 paid, $9,233 went to two members of Tilney's family. (Claim #129, A. p. 1288; A. p. 1293)

Claim forms were not sent to the creditors until December 1968. Along with the forms the receivers enclosed a report dated October 31, 1968 with financial data as of July 31, 1968 and stated that they regretted the delay in forwarding it, but that in the future they would be advised "periodically on all significant developments." (A. pp. 107-119) Thereafter, numerous creditors contacted Mrs. Tilney to express their utter disgust at the manner in which the receivers had been handling the estate and at the lack of information disbursed. (A. pp. 742-743) The SEC described their communications as "anguished cries for redress." (A. p. 541) Almost without exception, the creditors indicated to Tilney that the services and information received from the receivers and their retainers were inadequate. (A. p. 1090) They were upset, dismayed and outraged by the situation. (A. p. 1090) The following letter addressed to the receiver is but one of many letters and affidavits in the record (A. pp. 981-1010, 1091) attesting to this neglect of the creditors:

> "Don't you think it is time we heard from you or does a customer of Tilney have to enter suit in order to hear from Government appointed receivers? Don't you notify the other creditors or do you just hold on the money until the fees eat it all up. I am sure that you have had long enough by this time to liquidate half the United States. Will you please let us know what you are going to do. We haven't heard from you in years."

> "We have only heard from Mrs. Tilney who seems to be the only concerned person in the whole deal. Obviously, the Security Exchange Commission and the Court are all lawyers and are not concerned with creditors. I have around $5,000.00 worth of cash and stock (at cost) there and I have not heard a word from you.
>
> "Please waste a card, it shouldn't add much to your fees, take it out of my share but please let me know." (A. pp. 985-986; 740)

The SEC, which received a copy of this letter, responded by suggesting that Tilney creditors might get action by writing directly to the court and to their senators and congressmen. (A. p. 741)

The October 1968 report to the creditors was so erroneously gloomy that a number of them took deductions on their income tax returns for capital or bad debt losses. (A. p. 1090)

It is not disputed that the receivers lost track of many creditors, who were located only through the efforts of Mrs. Tilney. (A. pp. 1091, 721) The SEC has acknowledged Tilney's help in locating creditors. (A. p. 1125)

Substitution of Attorneys

On March 16, 1972, the firm of Cadwalader, Wickersham & Taft submitted an application to the Court to have the firm of Saxe, Bacon & Bolan substituted for it as counsel for Tilney. The motion was opposed by Receiver Hogan and resigned-Receiver Harris. Previously, in February, 1970, when it was proposed that Saxe, Bacon & Bolan represent Tilney on the question of opposing the sale by the Receivers of certain Alaska property, neither the Court nor the Receiver raised any objection. (A. pp. 381, 384-385, 411-414)

At the time of the application, the only major matters

remaining before the Court were the fixing of administrative fees, for which applications had already been filed, and the question of interest for the creditors. (A. p. 906) Thomas A. Bolan, then a senior partner in Saxe, Bacon & Bolan, had represented Mrs. Tilney and other creditors in the proceedings since December, 1970, and was fully familiar with all matters therein. (A. pp. 921, 906) The Court was assured that there would be no delay of any kind occasioned by the substitution and that Tilney's answering papers concerning the fee applications would be filed on time. (A. pp. 910, 913)

In support of the application, the Cadwalader firm stated that "the defendants believe, and this firm and Mr. Bolan's firm agree, that the most effective, expeditious and economical way to assert such opposition to the fees and allowances requested is to have the firm of Saxe, Bacon & Bolan represent all those parties and creditors who wish to assert such opposition. Also militating in favor of the substitution of Saxe, Bacon & Bolan for this firm is the fact that certain differences have arisen between this firm and the defendants with respect to the future conduct of the action on behalf of the defendants, which differences make it advisable that this firm withdraw from this action as attorneys of record for the defendants." (A. p. 907) Mr. Tilney stated in an affidavit that the differences between counsel were in the area of a surcharge claim to be brought against the receivers. (A. pp. 1176-1177)

The receivers contended that Saxe, Bacon & Bolan's representation of Tilney as well as certain of his creditors would constitute a conflict of interest. Bolan stated that the creditors and Tilney were in agreement on all issues remaining open in the receivership, pointing out that Mr. Tilney felt that the creditors should be paid interest. (A. pp. 920-921, 911-912) To eliminate any possibility of a conflict of interest, Bolan submitted general releases from the creditors, conditioned on his firm being substituted. (A. p. 921)

On April 18, 1972, the Court denied the application for a

substitution of attorneys, giving no reason for the denial other than to say that "upon all the factors involved," that the defendants "have not shown satisfactory reasons to allow the requested substitution." (A. p. 1021)

Pro Se Application

Having been refused a substitution of attorneys, Tilney, who by this point had received a rather costly four-year legal education in the Court below, endeavored to represent himself *pro se* on the surcharge application and submitted a Supplemental Affidavit sworn to April 17, 1972, in support thereof. The Court ruled that the affidavit did not have any validity, was not viable and was not properly before the Court. (A. pp. 1029, 1033) The Court stated that if Tilney wished "to submit any memorandum of law in support of the application and serve it upon your adversaries and furnish the Court with a copy, at that time consideration will be given to it." (A. p. 1032) The Court added that "if Mr. Tilney wants to proceed by appropriate papers, appropriate motion and appropriately supported in compliance with all the rules of the Court, he may, and he has permission to do so." However, the Court said that any such presentation by Tilney would not be considered on the question of the fees. (A. p. 1034)

The Court made what had become its ritualistic threats against any attempt at effective opposition by impliedly warning that Saxe, Bacon was not to prepare any surcharge papers: "I think it is very clear, and if there is any dereliction or any attempt made to avoid the order (denying a substitution of attorneys) I shall deal with it accordingly." (A. p. 1035)

On June 29, 1972, the Cadwalader firm submitted an application to the Court requesting permission for Tilney to represent himself *pro se* on the surcharge claim as set forth in the Supplemental Affidavit of April 17, 1972, and for permission to submit additional evidence in support of that claim. (A. pp. 1174-1180) A Memorandum of Law accompanied the application.

On October 2, 1973, the Court discharged the Cadwalader firm as attorney for Tilney on any possible matters involving surcharge. (A. p. 1323)

Although the Court had stated on April 19, 1972, that it would consider Tilney's application for a surcharge upon his filing a motion in proper form accompanied by a memorandum, which Tilney did file on June 29, 1972, the Court did not pass upon his application until February 21, 1974, when it rendered an opinion denying the application. (A. pp. 1335-1343) In a footnote to the opinion, the Court stated that it had refrained from ruling on the request "because consideration of a petition for surcharge was premature until the receivers presented their accounting."

POINT I

In view of the incompetent, negligent and improper manner in which the estate was administered, the fees awarded by the Court below were grossly excessive.

The proceedings below indicate an extreme abuse of the patronage process in the federal courts. Receivers have a duty not only to protect the creditors, but to preserve the assets of the defendant as well. Here, the receivers protected neither, but sought only to feather their own nests.

The receivers were appointed in December, 1967. By early 1969 there was sufficient cash available to pay all creditors without the need of further liquidation. From that point on, the only substantial question open was the amount of the receivers' fees. The receivers balked at every effort to have their final fees fixed. To the utter neglect of the creditors and Tilney, the receivership was prolonged an additional five years purely and simply for the benefit of its administrators.

Using the figures accepted by the SEC and the Court below, the receivership had assets of $700,000 with which

to pay off the creditors and to cover administrative fees. In April, 1969, Tilney advised the Court that the total amount of creditors' claims came to $264,000 (just $1,000 less than the amount ultimately paid 2½ years later) and that there was sufficient cash then on hand to pay them off without need for further liquidation. (A. pp. 159-A-159-D, 166) Thus, had the receivers set aside $300,000 for creditors' claims plus interest, they still would have had approximately $400,000 in assets remaining to pay their administrative fees. In December 1969, Hogan estimated liabilities at $340,000, as against assets valued at a minimum of $560,000. (A. pp. 336-340) In May 1970, and again in October 1970, resigned-receiver Harris in very emphatic terms informed the Court that there was more than enough in the estate to pay everybody. On January 29, 1971, the SEC noted the receivership had $400,000 in cash assets. As a matter of fact, eventually when all the creditors had been paid 100 cents on the dollar, plus 6% interest, and all administrative fees had been paid, Receiver Hogan on his own estimate had assets valued at $300,000 remaining for return to Tilney at the termination of the receivership.

In the words of the SEC, "the primary responsibility of the receiver"— payment of claims of the public investors who had dealt with Tilney — was in fact accomplished with relatively little effort beyond ascertaining the justness of their claims." There were only 137 creditors with claims of any substance and only 98 were public investor creditors. The administrative fees awarded below total $191,397.00 (of which $6,825 to accountant L.D. Blum is not in issue), as compared to the sum of $265,000 paid to the non-collateralized creditors, i.e., for every dollar paid out the receivers got 72 cents.

So far as liquidation is concerned, only a handful of transactions was involved. The entire list of liquidated securities is set forth on two pages of Receiver Hogan's final report. (A. pp. 1273-1274)

By July 16, 1969, the bulk of the liquidation had been accomplished ($840,274). During the next 1½ years, i.e., to December 31, 1970, liquidation totalled only $152,504. (A. p. 1274)

Incredibly enough, in the following 23 months no liquidation at all took place.

Extraordinary Delays by Receivers and Court

Starting in February 1968, and throughout the entire receivership Tilney complained of the receivers' delay and repeatedly demanded that their fees be fixed and the receivership terminated. The Court too constantly requested the receivers to act more speedily. Were it not for the devastating damage inflicted on Tilney during the period involved, the following directives of the Court (if viewed as issued in earnest, rather than to lend artistic verisimilitude to the farce being enacted) might seem hilarious by sheer force of their repetitive ineffectiveness year after year.

2/27/68 - Directs receivers to consider any reasonable plan for "earliest liquidation" or "liquidation with dispatch." (A. p. 67)

8/ 6/68 - Refers to "greater immediacy" in "winding up this estate." (A. p. 99)

11/18/68 - Says it is necessary to move along "with all due expedition" and doesn't want receivership to be "an albatross on his (Tilney's) back indefinitely." (A. p. 135)

6/ 5/69 - "Would like to wind up the estate at the earliest possible time." (A. p. 197)

6/26/69 - There will be all "haste and dispatch" and liquidation will be made "quickly and efficiently." (A. p. 227)

7/24/69 - Expects estate "to be liquidated no later than the first of the year." (A. p. 304)

9/24/69 - It is "extremely important" to get some estimate of the fees. (A. p. 323)

5/ 7/70 - "We have come to the time when we have got to act." (A. p. 542)

9/ 8/71 - "It would appear that the estate is close to being wound up and perhaps this might be an appropriate time to consider the final phase of winding up." (A. pp. 794-795)

11/27/72 - Asks that "all haste and expedition" be made to wind up estate and instructs receiver "to proceed at a full pace." (A. p. 1240)

These requests to the receivers to act speedily to wind up the estate, made over a 4½ year period, were totally ignored, the only exception being that they acted with great haste in paying themselves their fees, without a bond. Unfortunately, the Court never took action against the receivers to compel action.

The SEC also repeatedly complained of the receivers' delay:

9/24/69 - In urging a prompt payment of creditors, states that "justice long delayed is justice denied." (A. pp. 317-321)

10/15/70 - Asks court to find a way to bring on "as quickly as possible" application for final fees. (A. p. 598)

1/29/71 - Points out receivership is in fourth year and that the necessity for a swift and complete payout is "apparent and urgent." Asks Court to speed resolution of matter by fixing final fees. Urges upon Court "the absolute necessity of a swift and fair termination of this matter." (A. pp. 680-681)

4/29/71 - Seattle regional administrator states New York office advises creditors to write to Court, senators and congressmen to get action. (A. p. 741)

5/ 6/71 - Reminds Court of need for swift and immediate payment of creditors. (A. p. 695)

4/13/72 - Advises Court that there is a sufficient corpus to pay interest to creditors as well as administrative fees. (A. p. 926)

In its final report to the Court, the SEC states that "an unduly long delay has occurred in bringing this matter to completion." (A. pp. 1139-1140)

As an excuse for their neglect of duty, the receivers from time to time attempted to fix the blame on Tilney. The following are typical of delays by the receivers which cannot conceivably be attributed to Tilney:

7/24/69 - Receiver Hogan, attorneys and accountants promise to submit requests for allowances within one month. No one keeps this commitment. (A. pp. 303-304)

9/24/69 - Hogan again promises to submit an application for allowances, this time by the first of the year, and his colleagues promise theirs by November 24, 1969. (A. pp. 323, 326) A stipulation ordered by the Court dated November 24, 1969 (A. p. 334), extending the time to file to January 15, 1970, is ignored and Hogan does not submit application until April 29, 1970. Harris submitted his May 4, 1970.

11/27/72 - All creditors having been paid and administrative fees having been fixed, the Court instructs receiver to wind up estate with "all haste and expedition" and "to proceed at a full pace." (A. p. 1240) Hogan does not move

to terminate receivership until September 11, 1973.

Ironically enough, the Court below recognized as a factor in determining fees "the degree of dispatch with which the work of the receivership is conducted" (A. p. 1194), citing cases. However, not a word was uttered by the Court concerning the incredible delays involved in this estate. Rather, the Court commended the receivers for "their diligence and performance." (A. p. 1192)

These delays were not meaningless so far as Tilney was concerned. While the receivers held assets that rightfully belonged to him, he was forced to take his children out of private school, forced to live without heat, electricity and telephone for a good part of 1972, forced to forego medical and dental care, and forced to plead guilty to an indictment for lack of funds to pay counsel and witness expenses.

Receivers' Resistance to Filing Fee Applications

The receivers invariably resisted giving an estimate of their fees — to have done so would have eliminated the only unknown factor in the estate and resulted in its termination. As long as the question of fees was open, the receivers could argue that they had to carry on a program of liquidation to provide for those fees. It became a vicious circle. The receivers would not close out the estate because they maintained it was necessary to liquidate assets to cover their fees and the longer they liquidated, the more fees they were building up. The longer the estate continued, the larger their fees.

Tilney frequently requested the receivers to make an estimate of their fees, e.g., he did so at hearings on April 7, 1969, July 24, 1969, September 23, 1969, July 14, 1970 and October 15, 1970. (A. pp. 166, 302, 307, 560-A-561-A, 602)

The SEC made similar requests. (A. pp. 292-295, 317, 598, 675)

In July 1969 Hogan promised to submit an application for interim fees within a month, but did not keep his promise. In September, 1969, and later by stipulation dated November 24, 1969, Hogan promised to submit an application for fees by January, 1970. The promise and stipulation were totally ignored and Hogan did not file his application until April 29, 1970. Tilney did not sign this stipulation and he and his attorneys were not aware of its existence. No explanation appears in the record as to why the stipulation was not honored or why the SEC made no effort to enforce it.

Months went by and the Court finally scheduled a hearing on the fees for November 16, 1970. By this time the SEC, which had made a request for interim fees in July, 1969, and again in September, in the hope of quickly terminating the estate by doing so, had given up in disgust and took the position that any application for fees would have to be for final fees. Tilney joined in this position and the applications were withdrawn.

Creditors

Although the number of creditors was small and, in the words of the SEC, "relatively little effort" was required to pay them, the receivers treated them outrageously from start to finish. Claim forms were not even mailed to the creditors until one year after the receivers' appointment. Not only was there a long and totally unnecessary delay in paying them, but they were either misled or kept in the dark as to the progress of the estate. The SEC described their communications as "anguished cries for redress." They were only paid after Tilney had moved to terminate the receivership. When it came time to making payment, the receiver had lost track of many of them and it was Tilney himself who took the pains to locate those missing.

Although the Court had stated in January 1971 that a 65% payment (amounting to about $175,000) would be made to creditors (which he formally directed be done in May 1971), ten months later only $75,000 had been paid out, with $100,000 of the authorized payment still remaining unpaid. This delay was occasioned in great part by the fact that during the prior three years the receivers had failed to nail down the amounts owing to the creditors.

Exaggeration of Receivers' Performance

In addition to the inordinate delay in winding up the estate, the SEC took note of "duplication of effort by the co-receivers and among counsel;" that "much of the work performed by the several petitioners involved routine chores, as an examination of their time sheets reveals;" and that with respect to the accountants, "an unusual amount of time is claimed on behalf of senior as compared to junior personnel."

With respect to the time sheets and other data submitted by the receivers and their agents in support of their applications, Tilney submitted to the court below a detailed analysis of those records which graphically exposes the gross exaggerations of the receivers' claims. (A. pp. 943-958 and Exhibit 1 to Appendix) Although the SEC was critical of the receivers' performance, it is clear that that criticism was not sufficiently severe.

Tilney's analysis is a careful and exhaustive study of the receivers' claims. It breaks down that claim into 103 categories. As his analysis shows, the receivers and their agents claim to have spent a total of 5,648.32 hours of time on the receivership, which, based on their request of $309,415 for fees, comes to $54.78 per hour. Although the accountants' claimed time is divided as between partners and juniors. The Wagner firm shows no breakdown.

Tilney's analysis demonstrates that a great part of the receivers' efforts was expended at unnecessary further

liquidation of assets in order to provide an adequate fund for highly over-estimated administrative expenses. Furthermore, a number of activities engaged in by the receivers was totally unnecessary and unproductive for any purpose, e.g., their attempt to have Mr. and Mrs. Tilney held in criminal contempt and the tainted Waddington transaction.

Based on these and other considerations and using the hourly rates claimed by the receivers, Tilney's study shows that the receivers and their agents should be paid a total of $77,938 for the time spent by them.

It is to be emphasized that the receivers, their counsel and accountants acted as a unit in their representations and presentations to the Court, one exception perhaps being the accountants' report as of May 31, 1968 (A. pp. 95-98), when the accountants blamed the receivers and the receivers blamed the accountants for erroneous valuations contained therein.

In their various reports to the Court, the accountants consistently overstated liabilities and understated assets, thereby substantially contributing to the unnecessary prolongation of the receivership.

It is submitted that in view of the incredibly poor performance of the administrators, as set forth above, the following awards, as urged upon the Court below are appropriate: Hogan, $20,000; Wagner law firm, $40,000; Hertz Herson accounting firm, $20,000. Harris, for reasons set forth below, should have been awarded nothing.

Had Tilney been allowed to present his surcharge application, a hearing on said application would have shown that the administrators were not entitled to any fees.

POINT II

The receivers violated the provisions of Sections 2001 and 2004 of Title 28, United States Code.

Section 2001(a), 28 U.S.C., requires any realty sold by order of any federal court to be sold at public sale. However, Section 2001(b) permits a private sale if the Court finds that the best interests of the estate will be conserved thereby. For a private sale, the statute requires three separate appraisals to be made, with no sale to be made at less than 2/3 of the appraisal value, and newspaper notice must be given 10 days prior to the sale, the sale not to be confirmed if an offer guaranteeing a 10% increase in the sales price is received.

Section 2004 requires all personalty to be sold in accordance with Section 2001 "unless the court order otherwise." In other words, with respect to realty the above procedures are mandatory, but with respect to personalty the Court may order "otherwise."

With the exception of a sale of real estate in Alaska in early 1970 (A. pp. 380-381), the receivers did not follow the provisions of these statutes and never requested permission of the Court to enter into a private sale as mandated by the statutes.

Indeed, it would appear that the first party to recognize the applicability of these statutes was the SEC at a hearing in February 1970 (A. pp. 382-383), although prior thereto Mr. Tilney had requested the receivers to obtain appraisals of various properties.

The Court below in its opinion of October 19, 1972, states that Tilney's contention that the receivership was conducted in violation of these statutes "is frivolous and without any merit", citing *Tanzer* v. *Huffines*, 412 F. 2d 221 (3 Circ. 1969). That case does not govern the facts here and, as a matter of fact, clearly demonstrates the error committed by the receivers and by the Court.

Although the receiver in the *Tanzer* case had sold a controlling block of stock without utilizing the procedures specified by Section 2001, the stock was sold under a very elaborate and careful procedure designed by the Court to protect the estate. As permitted by Section 2004, the Court had ordered a procedure for the sale other than the one set forth in Section 2001. As stated in the opinion, "It is agreed that there the District Court did order otherwise, and the issue is whether it was justified in so doing" (p. 222).

In the instant case, no alternate procedure was ever requested or authorized by the Court. The receivers liquidated valuable assets on their own without the benefit of any procedures authorized by the Court. They were in clear violation of Sections 2001 and 2004, "procedures designed to protect the best interest of the estate." *Tanzer* v. *Huffines*, *supra*, (p. 222).

Furthermore, as pointed out in *Tanzer*, the statutes in issue express a preferential course to be followed in connection with a court authorized sale of property and that the District Court "should not order otherwise *except under extraordinary circumstances*." (p. 222). (Emphasis supplied)

Although the lack of independent financial appraisals caused the *Tanzer* court some concern, it was held that the District Court did not abuse its discretion in ordering "otherwise" than as directed by the statutes, in view of the poor financial condition of the corporation and in view of a deadline fixed by the offeror involved. Here not only was the Court not requested to approve a procedure other than the one specified by the statutes, but even if an application had been made, there was no basis for granting it. The "extraordinary circumstances" permitting a deviation from the statutory procedures were not present here. There were no deadlines to be met and no emergency situations to contend with.

The receivers' failure to obey the mandates of Sections 2001 and 2004 constitutes a clear dereliction of duty. On

this basis alone, their fees should be reduced to a bare minimum. Had Tilney been permitted to proceed with his surcharge application, he would have been able to demonstrate the damage caused by the receivers' failure to adhere to these statutes.

POINT III

Because of his misfeasance in office receiver Harris is not entitled to any compensation.

Receiver Harris sold 786.67 shares of stock of The Waddington Bank of New York, representing control of said bank, to a very close friend of his, one Jack H. Studley. Harris then received 100 shares of said stock from Studley without making any payment therefor and became a director of the bank. He not only concealed from the Court and the SEC his friendship with Studley, but also concealed from them (as well as from his co-receiver) the fact that he received 100 shares from Studley gratis and became a director of the bank.

Furthermore, as stated above, Harris and his co-receiver in this and other transactions violated the provisions of Sections 2001 and 2004 of 28 U.S.C. The stock was not sold at public auction; the requirements of a private sale were not met: no appraisals were obtained and no public notice given.

When the transaction was first revealed to the Court, it did not request Harris to resign as a receiver, but simply requested him to resign his directorship in Waddington and return the stock to Studley. It was only after the SEC had informed the Court that it considered the transaction "tainted" and demanded a rescision and only after Tilney had requested his resignation, did the Court take any action in this direction. Despite the sugar-coating of the Court's statements to him, a reading of the record makes it clear that the Court forced Harris to resign.

The Court below readily accepted Harris' assertion that the 100 shares of stock were transferred to him so that he could qualify as a director and that these shares of stock were not really his, but that he was holding them as a nominee for Studley. If Harris' contention is true, then he was in clear violation of Section 7001 of the New York Banking Law, which requires a bank director to be a stockholder of the bank "owning in his own right, free from pledge, lien or charge," a specified number of shares.

If, as claimed, Harris did not really own the stock in his own right, then he was practicing a gross deception on the New York Banking authorities.

Although at the time the transaction was revealed to it, the Court below stated that the matter had "distressed" it no end and caused it "sleepless moments," it nevertheless in fixing Harris' fee stated that the allegation that he breached his fiduciary duty to the estate "is not supported by any credible facts in the record." (A. p. 1198) It is submitted that the record demonstrates beyond any question a breach of a fiduciary duty which precludes the payment of any fee to Harris. He not only violated the provisions of Sections 2001 and 2004 in making a private sale, but he concealed his self-dealing in an estate asset from the Court, the SEC and his co-receiver. Only Harris was aware that 100 shares of the Waddington stock had been given back to him and that he had been made a director of the bank. *Crites* v. *Prudential*, 322 U.S. 408 (1944) clearly mandates no fee for Harris. In that case the co-receiver had entered into a personal agreement concerning receivership property which he did not reveal to the Court and also had entered into an illegal fee-splitting arrangement with the attorneys for the receivers. In holding that he was not entitled to any fees as co-receiver and should be surcharged for any profits realized by him, the Court stated that he was

> "bound to perform his delegated duties with the high degree of care demanded of a trustee or other

> similar fiduciary. He was not free to deal with the property under his control as co-receiver in such a way as to benefit himself ...
>
> ... he was also an officer or arm of the Court. He was appointed to assist the Court in protecting and preserving, for the benefit of all parties concerned, the property in the Court's custody ...
>
> ... all the Court officers were bound to act fairly and openly with respect to every aspect of the proceedings before the court ...

The Court pointed out that the co-receiver did not have

> "free reign to act in a secret, non-judicial manner ... The Court as well as all the interested parties, had the right to expect that its officers would not make undisclosed private agreements, fail to reveal any pertinent information or use their official position for their own profit or to further interests of themselves or any associates." (pp. 414-415)

In *Surface Transit, Inc.* v. *Saxe, Bacon & O'Shea*, 266 F. 2d 862 (2d Cir. 1959), this Court found that a person who, while acting in a fiduciary or representative capacity, purchased, sold or had transferred to his account or name, stock of or claims against a debtor without the prior consent of the judge would have any allowance due him completely barred. Although the particular situation referred to in the *Surface Transit* case was a bankruptcy situation, the Courts have continually noted the similarity between bankruptcy and equity receiverships, and hold equity receivers to the same standard of care in their fiduciary duties as would be applicable to a bankruptcy situation. *In re Garrett Road Corp.*, 256 F. Supp. 709 (E.D. Pa. 1966).

Conduct on the part of a fiduciary such as was indulged in here by Mr. Harris should not be encouraged, and indeed, should be actively discouraged by the Courts through denial of compensation. See *N. and G. Taylor* v. *Berger*, 49 F. Supp. 524, 526 (E.D. Pa. 1943). The often

quoted words of Judge Benjamin N. Cardozo defining the strict standard of conduct to which a fiduciary must adhere are as applicable today as they were when first made in 1928:

> "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions (*Wendt* v. *Fischer*, 243 N.Y. 439, 444). Only thus has the level of conduct for fiducaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court." *Meinhard* v. *Salmon*, 249 N.Y. 458, 464 (1928)

In passing, it should be noted that the Court below placed great emphasis on the fact that when the Waddington stock was resold at auction that it brought in the same price at which it was sold to Studley. Tilney has pointed out that market conditions had changed in the 14 month interval between the two sales and furthermore that Harris had greatly damaged the chances of getting a good price on the second sale by statements in open court that The Waddington Bank was in terrible condition. In any event, as stated by the SEC, because of the "taint" in the transaction, valuation was an irrelevant factor and a recision of the first sale was mandatory. The Court agreed with this position at the time, although it should be noted that Tilney had requested that a valuation of the stock be obtained before a resale. (A. pp. 216-222)

POINT IV

The SEC erroneously took the position that full payment of the creditors minimized its interest in opposing excessive fees.

Tilney is reluctant to criticize the SEC, being appreciative of the fact that year after year it beseeched the Court to wind up the estate, and that, sharing Tilney's exasperation and frustration, its New York office finally advised that creditors contact their congressmen and senators to see if some action could be obtained. Nevertheless, when it came time to making a recommendation concerning fees, it is submitted that the SEC fell down on the job.

As the government agency responsible for placing Tilney's assets in receivership, the SEC had the duty to preserve those assets, not only for the benefit of the creditors but for the benefit of Tilney as well. The SEC seriously neglected this obligation. The SEC took the position below that any opposition by it to excessive fees would have to be based primarily on the possibility that the creditors would not receive full payment with interest. Indeed, in an affidavit submitted to the Court, the Solicitor for the SEC stated that "if it should appear that the investor creditors would be paid in full with interest, the amount of allowances would not affect public investors and, accordingly, the Commission's interest in seeing that fees were not excessive would be minimized." (A. pp. 928-929)

Apparently in an effort to "minimize" the SEC's interest in opposing excessive fees, the Court shortly thereafter informed the SEC that interest would be paid the creditors and requested the SEC to revise its previous recommendation. It may be assumed that when the SEC, as a government agency, is requested by the Chief Judge of the United States District Court to revise its recommendation, that this is a kind of pressure that is difficult to resist.

In any event, the SEC, which had previously recommended that $153,870 be paid — some $30,000 below the amount subsequently awarded by the Court — thereupon increased its recommendation by 10% or $15,787, to a total of $169,657. The work required by the receiver, upon which this additional award of almost $16,000 was paid, consisted simply in computing interest and mailing checks for the same totaling $39,000 to 94 creditors. Indicative of the careless manner in which the SEC made its recommendation is the fact that it recommended an additional award of $2,500.00 to Harris in connection with the payment of this interest in 1972, although Harris had resigned in July, 1969, and had nothing whatsoever to do with the payment of the interest. (At about the same time the SEC was recommending this additional payment of $16,000 to the receivers, Tilney unsuccessfully pleaded with the Court to have funds released to defend himself against the Alaska indictment. It is to be kept in mind that the money involved at all times was Tilney's money and when the receiver finally moved to terminate the receivership, he still admittedly had $300,000 of Tilney's assets in his possession).

It is submitted that inasmuch as the SEC's opposition to excessive fees was predicated on a wrong premise, Tilney was gravely damaged by its recommendations. The mere fact that creditors were paid in full should not have "minimized" the SEC's interest in opposing excessive fees. That interest should have been based equally on a concern that Tilney was not unfairly deprived of his property, which property the SEC had been responsible for placing in receivership.

In its opinion, the Court below indicates that the SEC's recommendation as to fees was of "valuable aid" and was given "serious consideration." That recommendation was based on erroneous guidelines. Even so, the Court went one step beyond the SEC and its award was $30,000 above the SEC's original recommendation and $15,000 above the revised recommendation into which the SEC was pressured by the Court.

POINT V

The Court should have permitted Tilney a substitution of attorneys and, having denied a substitution, should have permitted him to proceed *pro se*.

When Cadwalader, Wickersham & Taft in March, 1972, requested the Court to substitute Saxe, Bacon & Bolan in its place, pointing out that certain differences of opinion with Tilney had made its withdrawal advisable, the only matters then remaining open were the fixing of administrative fees (for which applications had already been filed) and payment of interest to creditors. Saxe, Bacon & Bolan had been in the case for more than a year and promised the Court that answering papers on the fee application would be submitted within the time previously specified by the Court. As to the interest, Tilney had been on record on a number of occasions that he favored such payment.

Tilney, the Cadwalader firm and the Saxe Bacon firm were all in agreement that the most effective and economical way of proceeding from that point on was for a substitution of attorneys. No time would be needed for Saxe Bacon to get acquainted with the facts. Any question of a conflict of interest occasioned by the fact that Saxe Bacon had represented certain of the creditors was eliminated by general releases proferred by the Saxe Bacon firm on behalf of said creditors.

No delay, no inconvenience, no confusion, no duplication of effort could have resulted from a substitution of attorneys. There was no valid basis for denying it.

The Court below gave no reason whatsoever for denying the substitution other than to say that "upon all the factors involved," defendants had not shown "satisfactory reasons" for the substitution. The only case cited by the Court was *Butterman* v. *Walston & Co.* (7th Cir. 1967), 387 F. 2d 822, cert.. den. 391 U.S. 913, rehearing denied 395 U.S. 942. In that case, plaintiffs had requested a

continuance on the ground that their attorney had resigned. The Court of Appeals held that the lower court was justified in refusing to delay the case, inasmuch as plaintiffs had had four months' notice of the attorney's withdrawal. Of course, no delay was requested here since Tilney already had obtained substitute counsel.

Tilney suffered greatly as a result of the denial of the substitution application. He was in disagreement with the Cadwalader firm as to certain aspects of a proposed surcharge application against the receivers and the Court's failure to permit a substitution of counsel and its subsequent refusal to allow him to proceed *pro se* deprived him of his day in court on this important matter and the opportunity to recover what he believes is rightfully his property.

Having denied Tilney a substitution of counsel and thereafter permitting the Cadwalader firm to withdraw as to the surcharge application, Tilney was left without any counsel at all on this vital issue. The Court's refusal to allow him even to proceed *pro se* seriously compounded its previous error. The doors of justice have been closed to Tilney.

The Court below treated Tilney's application to represent himself with the same delay, neglect and disdain that characterized the conduct of the Court and receivers throughout these proceedings. Without benefit of counsel, Tilney filed his surcharge application in April, 1972. The Court refused to accept it, but stated that if Tilney submitted a memorandum of law "at that time consideration will be given to it." Tilney submitted a memorandum of law, along with an application to represent himself, on June 29, 1972. Tilney waited 20 months for a decision by the Court, which finally came on February 21, 1974. In a footnote, the Court stated that it had refrained from ruling on the request because it was premature until an accounting had been submitted by the receivers.

The Court's opinion of February 21, 1974, denying

Tilney's application to represent himself on the surcharge application is replete with substantial errors.

The Court refers to Tilney's application as an attempt to obtain a "hybrid" form of representation in which counsel of record would represent him "for all purposes except for the prosecution of the surcharge claim, in which he would represent himself." First of all, the Court had denied Tilney the right to substitute counsel, so that Tilney had no choice but to retain the Cadwalader firm on all matters but the surcharge. As to the surcharge, Cadwalader would not represent Tilney on this because of certain differences of opinion, so that again Tilney had no choice but to represent himself on this issue. More importantly, at the hearing on October 2, 1973, the Court actually discharged the Cadwalader firm as to all matters relating to the surcharge. The Court having first refused to permit a substitution of attorneys and then having discharged the Cadwalader firm, the only chance left for Tilney for a review of his claim was via the *pro se* route.

The "hybrid" cases cited by the Court have no bearing on the instant issue. Here by the time the Court passed on Tilney's application in February, 1974, there were no other issues at all left in the case — fees had been fixed and paid and the creditors paid in full with interest. Tilney's counsel had been discharged as to the only issue left in the case, the surcharge application. This is not a "hybrid" case — it is not a case of dual representation. A reading of the language selected by the Court from the cases relied on by it demonstrates beyond any doubt their inapplicability. For example, the Court cites *United States* v. *Foster*, 9 F.R.D. 367, 372 (S.D.N.Y. 1949) for the proposition that "where a party is represented by competent counsel his case should be conducted by that counsel." Tilney was not represented by counsel on the surcharge issue at any time — and

on October 2, 1973, the Court actually discharged his counsel on that issue. Again *Brasier* v. *Jeary*, 256 F. 2d 474, 477 (8th Cir. 1958) is cited for the proposition that a defendant does not have a right to representation personally and by counsel. What counsel did Tilney have on the surcharge issue? In all the cases cited by the Court, the litigant had counsel on all the issues involved. Here Tilney did not have counsel on the only issue remaining in the case, the surcharge application.

The Court states in its opinion that it is concerned about the "further delay" that would result in granting Tilney's application. In view of the snail-like performance of the receivers and the Court in the preceding six years, during which time Tilney was all but destroyed by their delays, it would seem that this concern came rather late in the game. It is indeed ironical that the Court should profess concern for delay after having taken 20 months to decide Tilney's application. And who was to suffer by this delay? The creditors had all been paid in full with interest. The receivers had all pocketed their fat fees and were now ready to go home leaving Tilney high and dry without even a hearing on his claim against them.

The Court states that the majority of Tilney's surcharge allegations were submitted by him in an affidavit dated April 17, 1972, in the context of a fee application and were considered and rejected by the Court in its opinion of October 19, 1972. The Court clearly is in error here. There were two affidavits submitted by Tilney on April 17, 1972, one by Cadwalader and another by Tilney himself on the surcharge claim entitled "Supplemental Affidavit in Opposition to Application for Fees and in Support of Application for Surcharge". The Tilney affidavit *pro se* listed 16 items of surcharge, whereas the Cadwalader affidavit only referred to two of these: the Waddington transaction and the Matinecock transaction. The Court accepted the Cadwalader affidavit, but refused to accept the Tilney affidavit, saying it did not have any validity, was not viable and was not properly before the Court. The Court stated

that even if Tilney made an appropriate motion appropriately supported in compliance with all rules of the Court (Tilney had not submitted a memorandum with his application), it would not be considered on the question of fees. A reading of the Court's opinion of October 19, 1972, would make it clear that the Tilney affidavit was not considered. No mention is made in it of Tilney's surcharge application and no mention made of his application to represent himself. The only reference made in the opinion to any of the 16 items of surcharge listed by Tilney is to the Waddington transaction which, of course, had also been cited in the Cadwalader affidavit. Indeed, Footnote 1 of the Court's opinion of February 21, 1974, refers to Tilney's surcharge affidavit, but states that the Court did not consider his application before because it thought it was premature "until the receivers presented their accounting" (which was not filed until October 1973). The Court, is, therefore, clearly wrong in stating that it had considered and rejected Tilney's surcharge claims.

The Court's improper description of Tilney's surcharge claims shows the need for a hearing. For example, the Court states that Tilney claims that the sale of certain City Commerce Corporation debentures was improper because it was made to a law firm. This is a gross distortion of Tilney's claim. His claim concerning this sale is twofold: (1) instead of waiting until July 1, 1971, when these debentures matured at their par value of $56,000, the receivers for no justifiable reason sold them in December, 1970, at $18,000 less than they would have received six months later when they matured plus interest; (2) the debentures were sold to an insider who knew that they had an additional value of $100,000 because of certain conversion features not known to the public. (A. pp. 1298-1299).

The receivers have never been required to answer Tilney's surcharge allegations. Tilney has never been provided with an opportunity to argue the matter of his surcharge application. It is submitted that Tilney like any

other litigant is entitled to his day in court. Thus far it has been denied him.

CONCLUSION

For the foregoing reasons, it is requested that the judgment below be reversed, that appellees be directed to return to Tilney forthwith all fees received in excess of $80,000 and that the balance of said fees received by them be placed in escrow pending a determination of the surcharge application, and that the Receivers be assessed all costs of the appeal.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK:
: ss:
COUNTY OF NASSAU:

GASPER CLEMENTE, being duly sworn, deposes and says:

That he is President of the Davenport Press, Inc., printers of the attached Brief in the matter of Securities and Exchange Commission, Plaintiff-Appellee, vs. Tilney & Company, Frederick Tilney, Defendants-Appellants, and I. Alan Harris (Cross-Appellant); Joseph C. Hogan, Appellee, in the United States Court of Appeals for the Second Circuit, No. 74-1693, No. 74-1704.

That on the 3rd day of July 1975 he served three (3) copies of said Brief on:

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by depositing same, securely enclosed in a post paid wrapper in a Post Office regularly maintained by the United States Government at Mineola, New York, County of Nassau, directed to said attorneys at the addresses

listed above, that being the addresses within the State designated for that purpose upon the preceding papers in this action, or the places where they then kept an office between which places there was and now is a regular communication by mail.

Deponent is over the age of 21 years.

Gasper L Clemente
GASPER CLEMENTE

KEVIN G. SLEICHER
NOTARY PUBLIC, State of New York
No. 30-4502141
Qualified in Nassau County
Commission Expires March 30, 1977

Sworn to before me this
3 day of July 1975.

Notary Public

FOUND
COUNTY Coroner
RAG COPIENT